

	Part I. General Provisions (Recodification Public Hearing Discussion Draft)	Notes
	<p align="center">BRRAC's [Real Estate Commission's] Prefatory Comment</p> <p>[This prefatory comment should also be incorporated as a "purpose" subsection in draft legislation that will eventually be part of the session laws text (but not part of HRS).]</p> <p>A. What is the Problem We're Trying to Fix?</p> <p>In 1961, Hawaii became the first state to pass a law enabling the creation of condominiums.¹</p> <p>The 1961 "Horizontal Property Regime" law consisted of 33 sections covering a little more than 3 pages in the Revised Laws of Hawaii. Since that time, the law has been amended constantly. Entering the 2003 legislative session, Hawaii's "Condominium Property Regime" law consisted of 120 sections taking up 100 pages in the Hawaii Revised Statutes. As noted by the 2000 Legislature, "[t]he present law is the result of numerous amendments enacted over the years made in piecemeal fashion and with little regard to the law as a whole."²</p> <p>The 2000 Legislature recognized that "[Hawaii's] condominium property regimes law is unorganized, inconsistent, and obsolete in some areas, and micromanages condominium associations . . . [t]he law is also overly regulatory, hinders development, and ignores technological changes and the present day development process."³ Consequently, the Legislature directed the Real Estate Commission of the State of Hawaii (Commission) to conduct a review of Hawaii's condominium property regimes law, and to submit draft legislation to the 2003 Legislature that will "update, clarify, organize, deregulate, and provide for consistency and ease of use of the condominium property regimes law."⁴</p> <p>In January 2001, the Commission embarked on its ambitious effort to rewrite Hawaii's Condominium Property Act (HRS Chapter 514A).⁵</p> <p>B. Why Should We Care?</p> <p>1. Prevalence of condominium ownership in Hawaii</p> <p>25% of Hawaii's housing units are held in condominium ownership. For decades, Hawaii has had the highest percentage of condominium housing units in the United States of America.⁶ This alone makes the recodification project extremely important for the citizens of Hawaii.</p>	

¹ Kerr, William; "Condominium – Statutory Implementation," 38 St. John's L. Rev. 1 (1963) (hereinafter, "Kerr"), at page 5. *See also*, Act 180, Session Laws of Hawaii (SLH) 1961; codified as Chapter 170A, Revised Laws of Hawaii (RLH). In 1968, RLH Chapter 170A was redesignated Chapter 514, Hawaii Revised Statutes (HRS) (Act 16, SLH 1968). In 1977, HRS Chapter 514 was re-enacted as a restatement without substantive change and redesignated HRS Chapter 514A (Act 98, SLH 1977).

² Act 213, SLH 2000.

³ *Id.*

⁴ *Id.*

⁵ The recodification workplan and timetable is attached to this report as Appendix B. It is also available on the Commission's website – <http://www.hawaii.gov/hirec/> – along with our base working document (a comparison of the 1994 Uniform Common Interest Ownership Act (UCIOA), 1980 Uniform Condominium Act (UCA), and HRS Chapter 514A), drafts of the recodified condominium law, and other recodification materials. Recodification status is reflected in the "Comments" section of the workplan.

⁶ *Community Associations Factbook*, by Clifford J. Treese (1999) (hereinafter, "CAI Factbook"), at page 18.

⁷ Kerr, *supra* note 1, at 3-4; CAI Factbook, *supra* note 6, at 5-6; Natelson, Robert G., *Law of Property Owners Associations*, (1989), at 3-35.

⁸ Kerr, *supra* note 1, at 3.

⁹ Kane, Richard J.; "The Financing of Cooperatives and Condominiums: A Retrospective," 73 St. John's L. Rev. 101 (Winter 1999), at 102.

¹⁰ Schriefer, Donald L.; "Judicial Action and Condominium Unit Owner Liability: Public Interest Considerations," 1986 U. Ill. L. Rev. 255 (1986), at note 2.

¹¹ Standing Committee Report 622, House Bill No. 1142 (1961).

¹² *State Savings & Loan Association v. Kuaian Development Company, Inc., et al.*, 50 Haw. 540, 547 (1968).

¹³ Standing Committee Report 622, House Bill No. 1142 (1961).

¹⁴ *Id.*

¹⁵ Prefatory Note, Uniform Condominium Act, 1980. As noted by the Hawaii State Senate Judiciary Committee Vice-Chair in 1976: "[The condominium property regime law] was originally intended to be a highly technical, legal vehicle for placing certain lands in the horizontal property regimes. It is becoming through our actions . . . a consumer protection section of the law. Anyone trying to use it in its technical sense will have extreme difficulty . . ." Standing Committee Report 939-76, Senate Resolution No. 439 (1976).

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	<p>2. Importance to more efficient use of Hawaii’s limited land resources</p> <p>As a very flexible form of real estate ownership, condominiums (especially traditional ones going up rather than out), have helped policymakers to discourage sprawl while still providing home ownership opportunities for many in our urban areas. Consistent with State and local government land use policies, the condominium form of ownership is a valuable tool in helping to develop higher density/lower per-unit cost homeownership opportunities (i.e., creating more affordable housing). Of course, condominiums encompass the entire spectrum of homeownership opportunities – from affordable to luxury units. All of this is important for an island state with limited land area.</p> <p>3. Importance to Hawaii’s housing stock and growth policies (e.g., private provision of “public” facilities and services)</p> <p>The rapid growth of common interest ownership communities (condominiums, cooperatives, and planned communities) since 1960 goes hand in hand with government policy for much of the past 30-40 years dictating that new development “pay its own way.” Condominiums and other common interest ownership communities (with their regimes of privately enforceable use restrictions and financial obligations paying for formerly “public facilities” such as roads, trash collection, and recreational areas) have become a critical part of our land use fabric. Indeed, virtually all new development in Hawaii consists of common interest ownership communities.</p> <p>Given the importance of condominiums to the quality of life of Hawaii’s people, it is important that we recodify our condominium law in ways that improve life for those who build, sell, buy, manage, and live in condominiums.</p> <p>C. Brief History of the Condominium</p> <p>Someone once said that “history is argument without end.” That is certainly true of the debate over the origin of condominiums. Some commentators have traced the first existence of condominiums to the ancient Hebrews in the Fifth Century B.C. Others have attributed the concept to the ancient Romans. Still others believe that Roman law was antithetical to condominium development and that the first proto-condominiums appeared in the Germanic states during the late Middle Ages. Suffice to say that the condominium property concept has a long, possibly ancient, history.⁷</p> <p>While their first existence in fact is widely disputed, condominiums were first afforded statutory recognition by the Code of Napoleon in 1804.⁸ The first sophisticated statute to authorize condominiums in the United States or its territories was the Puerto Rico Horizontal Property Act (so named because it contemplated a property regime of horizontally, as opposed to vertically, divided properties) in 1958.⁹ The United States Congress recognized condominiums in 1961 when it amended the National Housing Act to provide for federal insurance on condominium mortgages whenever state law recognized condominium ownership. With Hawaii leading the way, every state in the union had a statute authorizing the condominium form of ownership by 1968.¹⁰</p> <p>D. Basic Concepts</p> <p>Preliminarily, it is useful to understand exactly what a “condominium property regimes law” is – and what it isn’t. A condominium property regimes law is a land <i>ownership</i> law, a <i>consumer protection</i> law, and a community <i>governance</i> law. It is not a land <i>use</i> law (i.e., it does not govern what structures may be built on real property; separate state and county land use laws control – or should control – land use matters).</p> <p>A condominium property regimes law is essentially an <i>enabling</i> law, allowing people to:</p>	

¹⁶ Recodification Draft #1 is available on the Commission’s website – <http://www.hawaii.gov/hirec/>.

¹⁷ Every provision of HRS Chapter 514A was analyzed for possible inclusion within the structure of the UCA.

¹⁸ Members of the Blue Ribbon Recodification Advisory Committee are listed in Appendix C of this report.

¹⁹ Recodification Preliminary Draft #2 is attached to this report as Appendix D. As a work in progress, it is not currently available on the Commission’s website.

²⁰ *Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180, 181-182 (Fla. Dist. Ct. App. 1975).

²¹ See, e.g., the California Law Revision Commission’s (CLRC) efforts to recodify California’s common interest development law – the Davis-Stirling Act. You can access the CLRC Study H-850 online at: <http://clrc.ca.gov/pub/Study/H-RealProperty/H850-CommonInterestDevel/>.

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	<ul style="list-style-type: none"> • Own real estate under the condominium form of property ownership (i.e., a form of real property ownership where each individual member holds title to a specific unit and an undivided interest as a “tenant-in-common” with other unit owners in common elements such as the exterior of buildings, structural components, grounds, amenities, and internal roads and infrastructure); • Protect purchasers through adequate disclosures; and • Manage the ongoing affairs of the condominium community. <p>The ability to build, sell, buy, borrow/lend money, insure title, insure property, and more are all part of real property ownership and, therefore, part of condominium law.</p> <p>The 1961 Hawaii State Legislature expressly recognized that the condominium property regime law was “an enabling vehicle” that primarily “(a) sets forth the legal basis for a condominium, and (b) spells out the means of recordation.”¹¹ [Note: In 1968, the Hawaii Supreme Court commented that, although the original condominium property regime law was viewed as an enabling act, condominiums might have been cognizable under common law.¹²</p> <p>The Legislature was also concerned about protecting Hawaii’s consumers, noting that:</p> <p style="padding-left: 40px;">The citizens of Honolulu have suffered during the past one or two years several unfortunate experiences in cooperative apartment buying. When several millions of dollars were lost through loose handling of funds representing down-payments on individual apartment units, it became clear that controls had to be developed in order (a) to protect the buying public, and (b) through a bolstering of public confidence, to create for the developer a better reception for his product.¹³</p> <p>To that end, the 1961 Legislature added a part providing for the regulation of condominium projects by the Hawaii Real Estate License Commission (including the registration of projects by developers and requiring the issuance of public reports before offering any condominium units for sale).</p> <p>Finally, the 1961 Legislature provided for the internal administration of condominium projects. The 1961 condominium management provisions were minimized, however, because the Legislature believed that: 1) many details would more properly be included in by-laws to be passed by the council of co-owners; and 2) some details may have been contrary to F.H.A. regulations or to policies of lending institutions, making it impossible for prospective unit-purchasers to secure financing.¹⁴</p> <p>Hawaii’s “Horizontal Property Regimes” law of the early 1960s was typical of most “first generation” condominium laws. In the decades that followed, however, “[a]s the condominium form of ownership became widespread, . . . many states realized that these early statutes were inadequate to deal with the growing condominium industry. . . . In particular, many states perceived a need for additional consumer protection, as well as a need for more flexibility in the creation and use of condominiums.”¹⁵</p> <p>E. Evolving Approach to the Recodification of Hawaii’s Condominium Law</p> <p>1. Recodification Draft #1</p> <p>In January 2002, the Commission completed its initial draft of the recodification (statutory text and explanatory commentary).¹⁶ The 1980 Uniform Condominium Act (UCA), with appropriate changes incorporated from the 1994 Uniform Common Interest Ownership Act (UCIOA), served as the basis for the first draft of our recodified condominium law. Where appropriate, the Commission also incorporated provisions of HRS Chapter 514A,¹⁷ other jurisdictions’ laws, and the Restatement of the Law, Third, Property (Servitudes).</p> <p>Recodification Draft #1 provided a starting point and framework from which to: 1) work on specific problems, and 2) continue our discussions on improving Hawaii’s condominium law. Some portions are more complete than others, with Article 3 (Management of Condominium) needing a lot more work integrating provisions of HRS Chapter 514A and suggestions from stakeholders.</p> <p>2. Recodification Draft #2/Public Hearing Discussion Draft</p> <p>A Blue Ribbon advisory committee reviewed Recodification Draft #1.¹⁸ Based on feedback the Commission</p>	

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	<p>received from the advisory committee, realtors, property managers, and others, HRS Chapter 514A (rather than the uniform laws) is used as the base for most of the recodification draft #2 (i.e., general provisions; creation, alteration, and termination of condominiums; protection of purchasers; administration and registration of condominiums; and condominium management education fund). The Uniform Condominium Act and Uniform Common Interest Ownership Act – along with appropriate provisions of HRS Chapter 514A, other jurisdictions’ laws, and the Restatement of the Law, Third, Property (Servitudes) – remain as the base for condominium governance matters.¹⁹</p> <p>The preliminary draft #2 attached to the 2002 report to the Legislature has been refined and renamed “Public Hearing Discussion Draft.” After holding public hearings on the recodification in each of Hawaii’s counties, the Commission will incorporate appropriate changes and submit a final draft of the proposed condominium law recodification to the 2004 Legislature.</p> <p>F. Scope of Recodification</p> <p>The Commission considered expanding the scope of the recodification to include other Hawaii common interest ownership communities under a UCIOA-like law. [This would have included HRS Chapters 421H (Limited Equity Housing Cooperatives), 421I (Cooperative Housing Corporations), and 421J (Planned Community Associations).] The Commission quickly decided, however, that recodification of HRS Chapter 514A (Condominium Property Regimes) alone makes the most practical sense at this time.</p> <p>Condominium issues, in general, are substantially different from those of single-family detached units in planned communities. The unit owner mindsets, problems, and solutions are quite different for each type of common interest ownership community.</p> <p>A Florida court once observed that:</p> <p style="padding-left: 40px;">[I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners . . . each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.²⁰</p> <p>Single-family detached unit homeowners in planned communities generally have different expectations than condominium owners regarding the degree of freedom they must give up when they buy their respective units. This is one of the factors that make it exceedingly difficult to reconcile the varying interests of unit owners in different forms of common interest ownership communities.²¹</p> <p>Although condominiums can take many physical forms – from high-rise developments to townhouses to single-family detached units – the common perception that a condominium is a tall building consisting of many individual units within a common structure (“horizontal property regime”) makes it easier for average people to understand the interdependence of unit owners in condominiums (as opposed to single-family detached homeowners in planned communities).</p> <p>Therefore, the Commission has limited its efforts to recodifying Hawaii’s condominium property regimes law.</p> <p>G. Guiding Principles, Generally</p> <p>1. The Condominium Property Act should be construed in accordance with the purposes stated in Act 213 (SLH 2000) and this Prefatory Comment (i.e., to “update, clarify, organize, deregulate, and provide for consistency and ease of use of the condominium property regimes law”). The Act should also be construed to promote the interstate flow of funds to condominiums and to protect consumers, purchasers, and borrowers against condominium practices that may cause unreasonable risk of loss to them. Accordingly, the text of each section should be read in light of the purpose and policy of the rule or principle in question, and also of the Act as a whole.</p> <p>2. The recodified condominium law should enhance the clarity of the Condominium Property Act.</p> <p>We should consolidate or group together provisions on a single issue (e.g., proxies, assessments). We should eliminate the artificial approach regarding the contents of bylaws developed in HRS §514A-82(a) and (b). And we should minimize the statutory requirements for condominium governing documents while incorporating certain provisions</p>	

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	<p>currently in HRS §514A-82(a) and (b) in more appropriate statutory sections.</p> <ol style="list-style-type: none"> 3. The recodified condominium law should recognize the difficulty of a “one size fits all” approach to consumer protection and management provisions. 4. The Commission should have jurisdiction over only provisions it will enforce. 5. The Commission should require only information it will use. 6. Problems should be fixed where they are created. <p>Some stakeholders have asked that the condominium property regimes law be used to fix problems created by other provisions in HRS. Such problems should be fixed in the statutory provisions that created the problems in the first place.</p> <ol style="list-style-type: none"> 7. To the extent practicable, standardize approval percentage requirements. When necessary, conform to Fannie Mae, Freddie Mac, or HUD requirements. 8. The recodified condominium law should not result in an increase in the cost of government. <p>This goal is meant to limit the addition of new programs administered by government under the condominium law. If the Legislature wishes to add such programs (e.g., condominium courts), means of funding the new programs must also be established. It is possible that revised consumer protection requirements will affect government costs. We will not actually know if the goal of maintaining the cost of government in this area has actually been achieved until after practical experience working with the recodified condominium law. If proper administration of the new law actually requires more resources, the responsible government agency should ask for more resources or ask that particular requirements be revised.</p>	
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	SUBPART 1. DEFINITIONS AND OTHER GENERAL PROVISIONS	
	§ ____: 1-1. Short Title. [Source: UCA/UCIOA §1-101 ; HRS §514A-1.] This chapter may be cited as the Condominium Property Act.	
	§ ____: 1-2. Applicability. [Source: UCIOA §1-102.] Applicability of this chapter is governed by subpart 2 of this part.	

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	<p>§ ____: 1-3. Definitions. [Source: UCA/UCIOA §1-103; HRS §514A-3.] In the declaration and bylaws, unless specifically provided otherwise or the context otherwise requires, and in this chapter:</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. In Lewis Carroll's <i>Through the Looking Glass</i>, Alice meets up with Humpty Dumpty sitting on his wall. In the course of their conversation, the following exchange takes place:</p> <p>“There are three hundred and sixty-four days when you might get un-birthday presents,” [said Humpty Dumpty] “and only <i>one</i> for birthday presents, you know. There's glory for you!”</p> <p>“I don't know what you mean by ‘glory,’” Alice said.</p> <p>“Humpty Dumpty smiled contemptuously. “Of course you don't – till I tell you. I meant, ‘there's a nice knock-down argument for you!’”</p> <p>“But ‘glory’ doesn't mean ‘a nice knock-down argument,’” Alice objected.</p> <p>“When <i>I</i> use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean – neither more nor less.”</p> <p>“The question is,” said Alice, “whether you <i>can</i> make words mean so many different things.”</p> <p>“The question is,” said Humpty Dumpty, “which is to be master – that's all.”</p> <p>Definitions – what we mean by the words we use – are critical in “Condoland.” Through interpretation and amendment, definitions in HRS have gotten “curiouser and curiouser” over the years. With common understanding as our master, the recodified condominium law uses definitions contained in HRS Chapter 514A with, however, appropriate modifications and additions from the proposed Hawaii Administrative Rules (Title 16 , Chapter 107), UCA/UCIOA, and other sources.</p> <p>2. As noted in the official comments to §1-103 of UCA (1980) and UCIOA (1994):</p> <p>The first clause of this section permits the defined terms used in the Act to be defined differently in the declaration and bylaws. Regardless of how terms are used in those documents, however, terms have an unvarying meaning in the Act, and any restricted practice which depends on the definition of a term is not affected by a changed term in the documents.</p> <p>Example: A declarant might vary the definition of “unit owner” in the declaration to exclude himself in an attempt to avoid assessments for units which he owns. The attempt would be futile, since the Act defines a declarant who owns a unit as a unit owner and defines the liabilities of a unit owner.</p>	
	<p><u>“Affiliate of a developer” or “person affiliated with a developer” [Source: HRS §514A-84(a).] is a person that directly or indirectly controls, is controlled by, or is under common control with, the developer.</u></p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §514A-84(a) is the source of the definition of “affiliate of a developer”.</p>	
	<p>“Association” or “unit owners’ association” [Source: UCA/UCIOA §1-103(3); HRS §514A-3.] means the unit owners’ association organized under section ____: 5-2.</p> <p>“Commission” [Source: HRS §514A-3.] means the real estate commission of the state department of commerce and consumer affairs.</p> <p>“Common elements” [Source: UCA/UCIOA §1-103(4).] means:</p> <ul style="list-style-type: none"> (1) all portions of a condominium other than the units; and (2) any other interests in real estate for the benefit of unit owners that are subject to the declaration. 	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. Regarding HRS §514A-3's definition of “common element,” Senior Condominium Specialist Cynthia Yee</p>	

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	<p>noted that the phrase “unless otherwise provided in the declaration” has been very useful. The UCA and UCIOA recognize this. UCA/UCIOA §1-103 (Definitions) begins by stating: “In the declaration and bylaws (Section 3-106), unless specifically provided otherwise or the context otherwise requires, and in this chapter . . .” (various definitions follow). Further, the Comments to UCA/UCIOA §1-104 (Variation by Agreement) note that: “The following sections permit variation: . . . Section 1-103. [Definitions.] All definitions used in the declaration and bylaws may be varied in the declaration, but not in interpretation of the Act.” Therefore, we have kept the UCA/UCIOA definition of “common element” as is.</p> <p>2. As noted in the UCIOA (1994) comment:</p> <p style="padding-left: 40px;">[I]t is not difficult to envision cases where [acquiring real estate in addition to the land originally submitted to the declaration] would be desirable to the unit owners – for example, to acquire additional parking areas or open space. There is no reason to either prohibit the association from securing this result, or to require the formalities of an amendment of the declaration to redefine the boundaries of the common interest community; this would typically require a two-thirds vote of the unit owners under Section 2-117(a).</p> <p style="text-align: center;">. . . .</p> <p style="padding-left: 40px;">[T]he drafters contemplate that [a] condominium . . . association could also acquire title to real estate which is physically located outside the condominium . . . boundaries, in its own name, which would not automatically become a common element.</p> <p>There are condominiums in Hawaii that currently need to acquire additional “common element” property. For example, a Maui condominium is threatened by beach erosion and seeks to acquire an interest over additional property on which to build t-head groins or man-made breakwater reefs. However, HRS §514A-92.1 requires the approval of 90% of the apartment owners (nearly impossible to get) to designate “additional areas to be common elements or subject to common expenses after the initial filing of the bylaws or declaration.”</p> <p>Additionally, in instances where a unit has not been reserved for a resident manager, it may be desirable for the condominium association to acquire a unit for use by the resident manager.</p>	
	<p>“Common expenses” [Source: UCA/UCIOA §1-103(5); HRS §514A-3.] means expenditures made by, or financial liabilities of, the association for operation of the property, together with any allocations to reserves .</p> <p>“Common interest” [Source: HRS §514A-3.] means the percentage of undivided interest in the common elements appertaining to each unit, as expressed in the declaration, and any specified percentage of the common interests means such percentage of the undivided interests in the aggregate.</p> <p>“Common profits” [Source: HRS §514A-3.] means the balance of all income, rents, profits, and revenues from the common elements remaining after the deduction of the common expenses.</p> <p>“Completion of construction” [Source: HRS §514A-3.] means the issuance by the appropriate county official of a certificate of completion, <u>or, if no such certificate is normally issued, then the certification by an architect or engineer licensed in the State of Hawaii that the project is substantially complete, or the court filing of an affidavit of publication and the notice of completion as required by section 507-43, HRS, or by the issuance of a certificate of occupancy.</u></p> <p>“Condominium” [Source: UCA §1-103(7).] means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.</p>	
	<p style="text-align: center;">BRRAC’s [Real Estate Commission’s] Comment</p> <p>1. UCA §1-103(7) is the source of the definition of “condominium.”</p> <p>2. The official comment to UCA (1980) §1-103(7) makes clear that, unless the ownership interest in the common elements is vested in the owners of the units, the project is not a condominium.</p>	

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	<p><u>“Condominium map”</u> [Source: HAR §16-107-2, Proposed Rules, Draft #6 (5/17/02).] means the floor plans and elevations of the building or buildings containing information as required by section ____: 2-3.</p> <p><u>“Converted” and “conversion”</u> [Source: HAR §16-107-2, Proposed Rules, Draft #6 (5/17/02).] means the submission of a structure to a condominium property regime more than twelve months after construction of the structure has been completed. Completion of construction may be evidenced by the court filing of an affidavit of publication and the notice of completion as required by section 507-43, HRS, or by the issuance of the certificate of occupancy.</p> <p><u>“Declaration”</u> [Source: UCA §1-103(10); HRS §514A-3.] means any instruments, however denominated, that create a condominium, including any amendments to those instruments.</p>	
	<p><u>“Developer”</u> [Source: HRS §514A-3; HAR §16-107-2, Proposed Rules, Draft #6 (5/17/02).] means a person who undertakes to develop a real estate condominium project, including a person who succeeds to the interest of the developer by acquiring a controlling interest in the developer or in the project.</p> <p><u>“Development rights”</u> [Source: UCA §1-103(11).] means any right or combination of rights reserved by a developer in the declaration to:</p> <ul style="list-style-type: none"> (1) add real estate to a condominium; (2) create, <u>adjust, or redefine</u> units, common elements, or limited common elements within a condominium; (3) subdivide units, <u>combine units</u>, or convert units into common elements; or (4) withdraw real estate from a condominium. 	<p>Note: Consider incorporating UCA/UCIOA’s definition of “Declarant” for “Developer” as follows:</p> <p>“Developer” means any person or group of persons acting in concert who:</p> <ul style="list-style-type: none"> (1) as part of a common promotional plan, offers to dispose of his or its interest in a unit not previously disposed of; or (2) reserves or succeeds to any special developer right; or (3) applies for registration of a condominium under part III.
	<p style="text-align: center;">BRRAC’s [Real Estate Commission’s] Comment</p> <p>1. As noted in the official comment to UCA §1-103(11):</p> <p>“[D]evelopment rights” includes a panoply of sophisticated development techniques that have evolved over time throughout the United States and which have been expressly recognized (and regulated) in an increasing number of jurisdictions, beginning with Virginia in 1974.</p> <p>Some of these techniques relate to the phased (or incremental) development of condominiums which the declarant hopes, but cannot be sure, will be successful enough to grow to include more land than he is initially willing to commit to the condominium. For example, a declarant may be building (or converting) a 50-unit building on Parcel A with the intention, if all goes well, to “expand” the condominium by adding an additional building on Parcel B, containing additional units, as part of the same condominium. If he reserves the right to do so, <i>i.e.</i>, to “add real estate to a condominium,” he has reserved a “development right.”</p> <p>....</p>	<p>As explained in the UCA/UCIOA Comments, the definition of “declarant” (“developer”) is designed to exclude persons who may be called upon to execute the declaration in order to ratify the creation of the condominium, but who are not intended to be charged with the responsibilities imposed on developers by this Act if that is all they do. Examples of such persons include holders of pre-existing liens and, in the case of leasehold condominiums, ground lessors. (Of course, such a person could become a developer by subsequently succeeding to a special developer right.) Other persons similarly protected by the narrow wording of this definition include real estate brokers, because they do not offer to dispose of their own interest in a unit. Similarly, unit owners reselling their units are not developers because their units were “previously disposed of” when originally conveyed.</p> <p>If the association, itself, or in conjunction with another developer, is offering units for sale to others, and if those units have not previously been sold or otherwise disposed of, then the association itself is a developer.</p> <p>Finally, a person who, while in control of the association, chooses not to exercise that control, is still a developer.</p>
	<p><u>“Limited common element”</u> [Source: UCA §1-103(16).] means a portion of the common elements allocated by the declaration or by operation of section ____: 2-5 for the exclusive use of one or more but fewer than all of the units.</p> <p><u>“Majority” or “majority of unit owners”</u> [Source: HRS §514A-3.] means the owners of units to which are</p>	

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	<p>appurtenant more than fifty percent of the common interests, and any specified percentage of the unit owners means the owners of units to which are appurtenant such percentage of the common interests.</p> <p>"Managing agent" [Source: HRS §514A-3.] means any person [employed or] retained, as an independent contractor, for the purposes of managing the operation of the property. [Note: California excludes from the definition of "managing agent" both full-time employees of the association and "any regulated financial institution operating within the normal course of its regulated business practice." California Civil Code Section 1363.1(b). Have there been problems for regulated financial institutions in Hawaii?]</p> <p>"Master deed" or "master lease" [Source: HRS §514A-3.] means any deed or lease showing the extent of the interest of the person submitting the property to the condominium property regime.</p> <p>"Material facts" [Source: HAR §16-107-2, Proposed Rules, Draft #6 (5/17/02).] except as otherwise provided by law, means any fact, defect or condition, past or present, pertaining to the project, unit, or property being offered or proposed to be offered for sale, that would have a direct and substantial negative impact on the value of a unit, or compel a person to not purchase a unit.</p> <p>"Material respect" [Source: HAR §16-107-2, Proposed Rules, Draft #6 (5/17/02).] means a material fact, not previously disclosed in the most recent developer's public report, that renders the information provided in the developer's public report or in any disclosure statement inaccurate, including changes in the:</p> <p>(1) size, construction materials, location or permitted use of a unit or its appurtenant limited common element;</p> <p>(2) size, use, location, or construction materials of the common elements of the project;</p> <p>(3) common interest appurtenant to the unit; or</p> <p>(4) any other changes as determined by the commission.</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. "Material respect" refers to a change of a material fact that would require disclosure in an amended public report. It does not automatically give a prospective purchaser the right to rescind a contract to purchase a condominium. In order to give rise to rescission rights, a material change in a project must "directly, substantially, and adversely" affect the use or value of (1) the purchaser's unit or appurtenant limited common elements, or (2) those amenities of the project available for such purchaser's use.</p>	
	<p>"Operation of the property" [Source: HRS §514A-3.] means [and includes] the administration, fiscal management, and operation of the property and the maintenance, repair, and replacement of, and the making of any additions and improvements to, the common elements.</p> <p>"Person" [Source: HRS §514A-3.] means an individual, firm, corporation, partnership, association, trust, or other legal entity, or any combination thereof.</p> <p>"Project" [Source: HRS §514A-3.] means a real estate condominium project; a plan or project whereby a condominium of two or more units located within the condominium property regime are offered or proposed to be offered for sale.</p> <p>"Property" [Source: HRS §514A-3; UCIOA §1-103(26).] means [and includes] the land, whether or not contiguous and including more than one parcel of land, but located within the same vicinity, whether leasehold or in fee simple, to the extent of the interest held [therein] by the owner or lessee submitting such interest to the condominium property regime, the building or buildings, all improvements and all structures thereon, and all easements, rights, and appurtenances [belonging thereto, and all articles of personal property] intended for use in connection [therewith] with the regime, which have been or are intended to be submitted to the regime established by this chapter. "Property" includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.</p>	

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	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. The last sentence of the UCIOA (1994) §1-103(26) definition of "real estate" has been added to HRS §514A-3's definition of "property." UCIOA §1-103(26) reads as follows:</p> <p style="padding-left: 40px;">"Real estate" means any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests that by custom, usage, or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. "Real estate" includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.</p> <p>As noted in the official comments to UCA §1-103(21)/UCIOA §1-103(26):</p> <p>Although often thought of in two-dimensional terms, real estate is a three-dimensional concept and the third dimension is unusually important in the condominium context. Where real estate is described in only two dimensions (length and width), it is correctly assumed that the property extends indefinitely above the earth's surface and downwards toward a point in the center of the planet. In most condominiums, however, as in so-called "air rights" projects, ownership does not extend <i>ab solo usque ad coelum</i> ("from the center of the earth to the heavens"), because units are stacked on top of units or units and common elements are interstratified. In such cases the upper and lower boundaries must be identified with the same precision as the other boundaries.</p>	
	<p>"Resident manager" [Source: New.] means any person employed on-site to manage the operations of the <u>property</u>.</p> <p>"Time share unit" [Source: HRS §514E-1.] means the actual and promised accommodations, and related facilities, <u>which</u> that are the subject of a time share plan as defined in chapter 514E.</p> <p>"To record" [Source: HRS §514A-3.] means to record in accordance with chapter 502, or to register in accordance with chapter 501.</p> <p>"Unit" [Source: UCA §1-103(25).] means a physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described pursuant to section ____: 2- ____.</p> <p>"Unit owner" [Source: HRS §514A-3.] means the person owning, or the persons owning jointly or in common, a unit and <u>the</u> its <u>appurtenant</u> common interest <u>[appertaining thereto]</u>; provided that to such extent and for such purposes, <u>including the exercise of voting rights,</u> as <u>[shall be]</u> provided by lease registered under chapter 501 or recorded under chapter 502, <u>including the exercise of voting rights,</u> a lessee of a unit shall be deemed to be the <u>unit</u> owner <u>[thereof]</u>.</p> <p>All pronouns used in this chapter include the male, female, and neuter genders and include the singular or plural numbers, as the case may be.</p>	
	<p>§ ____: 1-4. Separate Titles and Taxation. (a) [Source: UCA/UCIOA §1-105(a); compare, HRS §514A-4 and 514A-5.] If there is any unit owner other than a developer, each unit that has been created, together with its interest in the common elements, constitutes, for all purposes, a separate parcel of real estate.</p> <p>(b) [Source: UCA/UCIOA §1-105(b); HRS §514A-6.] If there is any unit owner other than a developer, each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements <u>[for which a developer has reserved no development rights]</u>. The laws relating to home exemptions from state property taxes are applicable to <u>the</u> individual units, which shall have the benefit of home exemption in those cases where the owner of a single-family dwelling would qualify. Property taxes assessed by the State <u>or any county</u> shall be assessed <u>[on]</u> and collected on the individual units and not on the property as a whole. Without limitation of the foregoing, each unit and <u>the</u> its <u>appurtenant</u> common interest <u>[appertaining thereto]</u> shall be deemed to be a "parcel" and shall be subject to separate assessment and taxation for all types of taxes authorized by law, including, but not limited to, special assessments.</p> <p>(c) [Source: UCA/UCIOA §1-105(c).] Any portion of the common elements for which the developer has reserved any development right must be separately taxed and assessed against the developer, and the</p>	

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	<p>developer alone is liable for payment of those taxes.</p> <p>(d) [Source: UCA/UCIOA §1-105(d).] If there is no unit owner other than a developer, the real estate comprising the condominium may be taxed and assessed in any manner provided by law.</p>	
	<p>BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. UCA/UCIOA §1-105 and HRS §§514A-4, 514A-5, and 514A-6 are the sources of this section. 2. The official comments to §1-105 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting this section. 	
	<p>§ ____: 1-5. Conformance with State and County Land Use Laws. [Source: UCA/UCIOA §1-106; HRS §514A-1.6; modified.] (a) Any condominium property regime established under this chapter shall conform to the existing underlying state and county land use and zoning laws, regulations, ordinances, and rules for the property to ensure the conformance by owners of lands subject to a condominium property regime with the purposes and provisions of such state and county land use and zoning laws, regulations, ordinances, and rules. Except as provided in subsection (b), provisions of this chapter do not invalidate or modify any provision of any building code, zoning, subdivision, or other state or county land use law, ordinance, rule or regulation governing the use of real estate.</p> <p>(b) No [state or] county land use law, ordinance, rule or regulation shall prevent any person from submitting any property [of] in this State to a condominium property regime and from holding title to lands [of] in this State under a condominium property regime, <u>or from obtaining an effective date for a public report from the commission.</u></p> <p>(c) In the case of a property which includes one or more existing structures being converted to condominium status, the condominium property regime shall comply with section ____: 4-3.1(a).</p>	
	<p>BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. UCA/UCIOA §1-106 and HRS §514A-1.6, substantially modified, are the sources of this section. 2. The official comments to §1-106 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting this section. 3. There appears to be quite a bit of confusion over the fact that condominium property is a land <i>ownership</i>, as opposed to a land <i>use</i>, concept. In response to the Commission's request for comments from the community, various parties asked that Hawaii's condominium property regime law be used to ensure compliance with land <i>use</i> laws (e.g., HRS Chapter 205 and county zoning, subdivision, and building ordinances). The suggestions of two of these parties – the State Department of Business, Economic Development & Tourism (DBEDT) and the County of Hawaii – are described below. <p>Hawaii's counties (particularly the Neighbor Island counties) have long complained that developers were using HRS Chapter 514A to circumvent underlying county land use laws. However, the counties have always had the power to regulate the <i>uses</i> of land pursuant to their police powers (i.e., their powers to protect the public health and safety – the legal basis for zoning laws) under HRS Chapter 46.²² HRS §514A-1.6, passed by the Legislature in 2000, simply made this explicit in the condominium property regime law.²³</p>	

²² See, HRS §§46-1.5(13) and 46-4.

²³ The Commission incorporated HRS §514A-1.6 in Recodification Draft #1, §1-106(c). While it is somewhat duplicative of Recodification Draft #1, §1-106(b), HRS §514A-1.6 contains specific references to requirements for condominium conversion projects. The Commission also added language to Recodification Draft #1 requiring that condominium property regime projects conform to HRS Chapter 205 (State Land Use Law).

²⁴ September 20, 2001 letter from DBEDT – Office of Planning to Gordon M. Arakaki.

²⁵ May 29, 2001 letter from County of Hawaii Planning Department to Mitchell A. Imanaka and Gordon M. Arakaki.

²⁶ Ordinance 02 111 (effective 9/25/02).

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	<p>a. DBEDT's Suggestions</p> <p>DBEDT has suggested that: 1) the statutory language of HRS §514A-1.6 be retained; 2) HRS §514A-1.6 be amended to add language requiring conformance of condominium property regimes with HRS Chapter 205; 3) the statutory language of HRS §514A-45 be retained; 4) counties be afforded the opportunity to review condominium property regime site or parcel plans/maps prior to recordation so that any questions as to conformance with county codes can be examined prior to recordation and the establishment of ownership interests in the units created under a condominium property regime; and 5) the Commission carefully examine how to effectively manage condominium property regimes on agricultural lands, and how State or county laws or codes should be amended to best address the issue.²⁴</p>	

²⁷ In a series of meetings, e-mail, and letters, the Commission attempted to educate the County of Hawaii about condominium property regimes. However, many of our cautions went unheeded.

²⁸ Although ultimately not incorporated by the Commission, the overall approach taken by UCA/UCIOA (upon which Recodification Draft #1 is based) appeared to solve the problem. The Acts appear to contemplate that all condominium projects go through appropriate land use processes before recordation and sale unless, based on specific criteria, the Commission determines that a declaration may be recorded and units registered. UCA/UCIOA §2-101(b) prohibits the recordation (hence, creation) of a condominium declaration unless:

1) “[A]ll structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by an independent (registered) engineer, surveyor, or architect;” or

2) “[T]he agency has approved the declaration or amendment in the manner prescribed in Section 5-103(b).”

UCA/UCIOA §5-103 allows a developer to record a condominium declaration for the purpose of creating a condominium in which the units are not substantially completed *if* the agency (i.e., the Real Estate Commission) determines, “on the basis of the material submitted by the declarant and any other information available to the agency, that there is a *reasonable basis to expect that the units to be conveyed will be completed by the declarant following conveyance*.” [Emphasis added; *see*, UCA/UCIOA §5-103(c)] To help the Commission determine whether there is a “reasonable basis to expect that the units to be conveyed will be completed . . . following conveyance,” UCA/UCIOA §5-103(b) requires the developer to submit the following:

(1) a verified statement showing all costs involved in completing the buildings containing those units;

(2) a verified estimate of the time of completion of construction of the buildings containing those units;

(3) satisfactory evidence of sufficient funds to cover all costs to complete the buildings containing those units;

(4) a copy of the executed construction contract and any other contracts for the completion of the buildings containing those units;

(5) a 100 percent payment and performance bond covering the entire cost of construction of the buildings containing those units;

(6) plans for the units conforming to the requirements of Section 2-109(c);

(7) if purchasers’ funds are to be utilized for the construction of the condominium, an executed copy of the escrow agreement with an escrow company or financial institution authorized to do business within the state which provides that:

(i) disbursements of purchasers’ funds may be made from time to time to pay for construction of the condominium, architectural, engineering finance, and legal fees, and other costs for the completion of the condominium in proportion to the value of the work completed by the contractor as certified by an independent (registered) architect or engineer, or bills submitted and approved by the lender of construction funds or the escrow agent;

(ii) disbursement of the balance of purchasers’ funds remaining after completion of the condominium shall be made only when the escrow agent or lender receives satisfactory evidence that the period for filing mechanic’s and materialman’s liens has expired, or that the right to claim those liens has expired, or that the right to claim those liens has been waived, or that adequate provision has been made for satisfaction of any claimed mechanic’s or materialman’s lien; and

(iii) any other restriction relative to the retention and disbursement of purchasers’ funds required by the agency; and

(8) any other materials or information the agency may require by its rules.

[Note: These requirements are similar to those of HRS §514A-40 (Final Reports).]

²⁹ DBEDT – Office of Planning and the county planning directors object to the principal that physically identical developments should be treated equally (incorporated in §1-106(a) of Recodification Draft #1). *See*, September 19, 2002 letter from DBEDT – Office of Planning to Mitchell Imanaka and Gordon Arakaki. *See also*, County of Hawaii’s Ordinance 02 111 (effective 9/25/02).

³⁰ An exception to the general rule that physically identical developments should be treated equally is the City and County of Honolulu’s prohibition on condominiumizing Ohana units created pursuant to HRS §46-4. *See*, Revised Ordinances of Honolulu §21-8.20. An Ohana unit is a second home permitted on a lot where the underlying zoning normally allows only one house. Infrastructure adequacy and other conditions determine whether an Ohana unit may be built, and an applicant for an Ohana building permit must file a restrictive covenant agreeing *not* to register the property as a condominium and to abide by a family occupancy requirement. Ohana units are the result of the State Legislature’s attempt to address a shortage of affordable housing by essentially forcing the counties to accept housing densities double that allowed by county zoning. Under this circumstance, it is appropriate for the counties to have the power to prohibit the condominiumization of Ohana units. The counties’ authority to do so should be made clear in HRS §46-4, however, *not* the condominium property regime law.

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	<p>b. County of Hawaii's Suggestions</p> <p>The County of Hawaii initially suggested that Hawaii's condominium law be amended to: 1) require county certification of compliance with applicable codes for all condominium projects before final public reports may be issued (not just condominium conversions, as is currently the case under HRS §514A-40); 2) require minimum value for condominium apartments (to prevent "toolshed" apartments); 3) explicitly require that condominium property regimes follow county subdivision codes; and 4) ensure that county planning departments are allowed to comment on notice of intention for all condominium projects, at an early stage.²⁵</p> <p>Ultimately, in September 2002, the County of Hawaii passed an ordinance purporting to "regulate CPRs that are the equivalent of subdivisions of land."²⁶ Whether the ordinance can survive legal and practical challenges remains to be seen.²⁷</p> <p>c. Analysis</p> <p>DBEDT-OP, the County of Hawaii, and others have raised legitimate concerns over the current interplay between HRS Chapter 514A and state and county land use laws. The question remains how to properly address the problem. In crafting a provision to prevent abuse of the condominium property regimes law as it relates to underlying land use laws, the Commission (and ultimately the Legislature) should take the following factors into consideration:</p> <ul style="list-style-type: none"> • Purpose of Condominium Property Regime Law. As previously noted, a condominium property regimes law is a land <i>ownership</i> law, a <i>consumer protection</i> law, and a community <i>governance</i> law. It is not a land <i>use</i> law (i.e., it does not govern what structures may be built on real property; separate state and county land use laws control – or should control – land use matters). (See, "Basic Concepts" discussion above.) As a consumer protection law, the primary purpose of Hawaii's current condominium property regimes law is to make sure that buyers know what they are buying. Theoretically, if a sophisticated buyer wants to take a chance on being able to get government approval to build a structure that is not allowed under State or county land use laws at the time of purchase, that should be the buyer's choice. The key is to give the buyer a chance to make an informed decision. • Purpose of the Real Estate Commission. The Real Estate Commission is a consumer protection body established under HRS Chapter 467 (Real Estate Brokers and Salespersons) to regulate real estate licensees. The purpose of HRS Chapter 467 (and the Commission) is to protect the general public in its real estate transactions. Pursuant to HRS §467-3, the Real Estate Commission consists of nine members, at least four of whom must be licensed real estate brokers. • Need for Appropriate and Consistent Lines of Authority. All parties need to make sure that the appropriate governmental entities enforce the appropriate laws. County land use agencies – i.e., planning and permitting departments – have the responsibility for ensuring that all proposed development projects comply with county land use laws. County councils have the authority to pass laws giving county land use agencies the tools to ensure that any proposed condominium development complies with county land use laws. • Timing. Under Hawaii's current law, condominiums are created upon proper filing with Bureau of Conveyances or Land Court. The Real Estate Commission's involvement begins when condominium units are offered for sale. <p>As the Commission continues its efforts to recodify Hawaii's condominium law, it has tried to keep the condominium law (and the Real Estate Commission) true to its purpose while making it clear that HRS Chapter 205 and county land use laws control land use matters.²⁸</p> <p>It does not appear to be necessary or appropriate in the recodified Hawaii condominium law to have blanket requirements that: 1) make the recordation of all condominium property regime declarations (and other applicable documents) contingent upon county certification of compliance with county land use laws, or 2) make the sale of any condominium units (currently allowed upon the Commission's issuance of an effective date for a project's preliminary, contingent final, or final public report) contingent upon county certification of compliance with county land use laws.</p> <p>Finally, consistent with the principle that physically identical developments should be treated equally, the counties can simply draft land use ordinances governing the development of condominiums.²⁹ The ordinances should hold</p>	

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	<p>condominium developments to the same standards as physically identical developments under different forms of ownership.³⁰ In other words, the ordinances should require that condominium developments follow the same physical requirements (density, bulk, height, setbacks, water, sewerage, etc.) as physically identical developments under existing land use requirements (e.g., zoning, subdivision, building code, and cluster development laws). If a particular development proposal is inconsistent with state and county land use laws under forms of real estate ownership other than condominium ownership, the condominium property regimes law does not and will not somehow allow the project to be built.</p> <p>Land <i>use</i> laws should control land <i>use</i> matters. The condominium property regimes law should continue to encompass and control land <i>ownership</i>, <i>consumer protection</i>, and condominium <i>community governance</i> matters. And just as it would be inappropriate for the Real Estate Commission to control land <i>use</i> matters, it would be inappropriate for land use agencies to control condominium property regime matters.</p>	
	<p>§ ____: 1-6. Supplemental General Principles of Law Applicable. [Source: UCA/UCIOA §1-108.] The principles of law and equity, including the law of corporations and unincorporated associations, the law of real property, and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this chapter, except to the extent inconsistent with this chapter.</p>	
	<p style="text-align: center;">BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. UCA/UCIOA §1-108 is the source of this section. 2. The official comments to §1-108 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting this section. <p style="text-align: center;">Condominium Recodification Attorney's Comment</p> <p>Members of the Real Property & Financial Services Section of the Hawaii State Bar Association (HSBA) and condominium management law attorneys expressed concerns regarding the Hawaii Nonprofit Corporations Act passed by the 2001 Legislature (Act 105, SLH 2001, effective date 7/1/2002). While the extent of the Act's application to nonprofit corporation condominium associations was unclear, many provisions would have been disastrous if applied to common interest ownership communities.</p> <p>For example, § -88 of the law as originally enacted would have allowed members of nonprofit corporations to resign at any time. This is clearly impossible for common interest ownership communities, where membership in the community association (with all of its rights and obligations) is mandatory and runs with the land. As defined in §1.8 of the <i>Restatement of the Law, Third, Property (Servitudes)</i>:</p> <p style="padding-left: 40px;">A "common-interest community" is a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal</p> <ol style="list-style-type: none"> (1) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or (2) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood. <p>Other sections of the new nonprofit corporation law required notice that may have been different from existing provisions in declarations and bylaws. Many other provisions would have been inappropriate for nonprofit corporation condominium (and community) associations, but § -321 (a transition provision) could have been read to mandate application of the new law to all nonprofit corporations in existence on the effective date of the Act.</p> <p>The recodified condominium law makes it clear that supplemental general principles of law (such as the nonprofit</p>	

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	corporation law) apply only to the extent they are consistent with the condominium law.	
	§ ____: 1-7. Construction Against Implicit Repeal. [Source: UCA/UCIOA §1-109.] This chapter being a general act intended as a unified coverage of its subject matter, no part of it shall be construed to be impliedly repealed by subsequent legislation if that construction can reasonably be avoided.	
	<p style="text-align: center;">BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. UCA/UCIOA §1-109 is the source of this section. 2. The official comments to §1-109 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting this section. 	
	§ ____: 1-8. Severability. [Source: UCA/UCIOA §1-111.] If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provisions or applications, and to this end the provisions of this chapter are severable.	
	<p style="text-align: center;">BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. UCA/UCIOA §1-111 is the source of this section. 	
	§ ____: 1-9. Obligation of Good Faith. [Source: UCA/UCIOA §1-113.] Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.	
	<p style="text-align: center;">BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. UCA/UCIOA §1-113 is the source of this section. 2. The official comments to §1-113 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting this section. 	
	<p>§ ____: 1-10. Remedies To Be Liberally Administered. [Source: UCA/UCIOA §1-114.] (a) The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. Consequential, special, or punitive damages may not be awarded, however, except as specifically provided in this chapter or by other rule of law.</p> <p>(b) [Source: California Civil Code §1370.] <u>Any deed, declaration, bylaw, or condominium map shall be liberally construed to facilitate the operation of the condominium.</u></p> <p>(c) Any right or obligation declared by this chapter is enforceable by judicial proceeding.</p>	
	<p style="text-align: center;">BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. UCA/UCIOA §1-114 and California Civil Code §1370 are the sources of this section. 2. Subsection (b) is intended to <i>negate</i> any implication that the Hawaii Supreme Court holdings regarding restrictive covenants/equitable servitudes in <u>Hiner v. Hoffman</u>, 90 Haw. 188, 977 P.2d 878 (1999), and <u>Fong v. Hashimoto</u>, 92 Haw. 568, 994 P.2d 500 (2000), apply to condominium communities. Given the importance of condominiums to the quality of life of Hawaii's people, laws must support the fair and efficient functioning of our condominium communities (and other common interest ownership communities). <p>In <u>Hiner</u>, defendants-appellants ("Hoffmans") constructed a three story house on a lot which was (along with 118 other lots) subject to a restrictive covenant prohibiting any dwelling "which exceeds two stories in height." The Hoffmans had actual knowledge of the restrictive covenant. After warning the Hoffmans of their violation of the restrictive covenant, neighboring homeowners and the community association sued to have the Hoffmans remove the third story of their house.</p> <p>At the trial court level, the Hoffmans argued that their house consisted of "two stories and a basement." The trial court rejected the Hoffmans' argument and ordered them to remove the third (top) story of their house.</p> <p>On appeal, the Hoffmans changed their argument and claimed that the term "two stories in height" was ambiguous.</p>	

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	<p>In a 3-2 decision, the Hawaii Supreme Court ruled that the term “two stories in height” was ambiguous since it did not provide any dimensions for the term “story” and was therefore unenforceable in light of the restrictive covenant’s undisputed purpose (to protect views by restricting the height of homes within the neighborhood). The majority on the Court stated that it was following a “long-standing policy favoring the unrestricted use of property” when construing “instruments containing restrictions and prohibitions as to the use of property.” Finally, the majority noted that “such ‘free and unrestricted use of property’ is favored only to the extent of applicable State land use and County zoning regulations.”</p> <p>In so doing, the majority ignored the massive growth of servitude regimes over the past forty years and the corresponding importance of ensuring the fair and efficient functioning of such communities (whether they be condominiums or, as in this case, planned communities). As noted by the dissent in <u>Hiner</u>, “where one hundred or more homeowners in the Pacific Palisades community have limited their own property rights in reliance that their neighbors will duly reciprocate, . . . it [is] manifestly unjust to sanction the Hoffmans’ willful non-compliance based on the ‘policy favoring the unrestricted use of property.’” The dissent concluded with the observation that “the majority opinion over-emphasizes the rights of the Hoffmans without due regard to the rights of their neighbors.”</p> <p>Eight and a half months after deciding <u>Hiner</u>, the Hawaii Supreme Court in <u>Fong</u> invalidated as ambiguous a restrictive covenant limiting certain houses to “one-story in height.” (The Court also found that there was no common scheme to support an equitable servitude and that the restrictive covenant was unenforceable since it was improperly created.)</p> <p>The archaic body of servitudes law from which the Hawaii Supreme Court fashioned its decisions in <u>Hiner</u> and <u>Fong</u> evolved from rules developed to govern relatively small groupings of property owners (compared to today’s condominium and planned development communities) in contexts largely unrelated to modern common interest ownership communities. [Note: The <i>Restatement of the Law, Third, Property (Servitudes)</i> defines “servitude” as “a legal device that creates a right or an obligation that runs with land or an interest in land.” This covers “easements, profits, and covenants that run with the land,” and encompasses both “restrictive covenants” and “equitable servitudes.”]</p> <p>Contrast the Hawaii Supreme Court’s current approach regarding servitudes in common interest ownership communities with that of the <i>Restatement of the Law, Third, Property (Servitudes)</i>. As stated in the <i>Restatement’s</i> introductory note to Chapter 6 – Common-Interest-Communities:</p> <p style="padding-left: 40px;">The primary assumption underlying Chapter 6 is that common-interest communities provide a socially valuable means of providing housing opportunities in the United States. The law should facilitate the operation of common-interest communities at the same time as it protects their long-term attractiveness by protecting the legitimate expectations of their members.</p> <p style="padding-left: 40px;">The Commission recommends that the courts look to the <i>Restatement</i> for guidance in resolving disputes over servitudes in condominiums (and, at least by analogy, other common interest ownership communities).</p> <p style="padding-left: 40px;">An earlier incarnation of the Hawaii Supreme Court said it well. In <u>State Savings & Loan Association v. Kauaian Development Company, Inc., et al.</u>, <i>supra</i> at 552 and 555, the Court stated that:</p> <p style="padding-left: 40px;">The [Horizontal Property Regimes Act] has profound social and economic overtones, not only in Hawaii but also in every densely populated area of the United States. Our construction of such legislation must be imaginative and progressive rather than restrictive.</p> <p style="padding-left: 40px;">. . . .</p> <p style="padding-left: 40px;">This court will not follow a common law rule relating to property where to do so would constitute a quixotic effort to conform social and economic realities to the rigid concepts of property law which developed when jousting was a favorite pastime.</p>	
	SUBPART 2. APPLICABILITY [Compare: HRS §514A-1.5.]	

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	<p>§ ____: 1-11. Applicability to New Condominiums. [Source: UCIOA §1-201.] Except as provided in section ____: 1-12, this chapter applies to all condominiums created within this State after the effective date of this chapter. The provisions of chapter 514A do not apply to condominiums created after the effective date of this chapter. Amendments to this chapter apply to all condominiums created after the effective date of this chapter or subjected to this chapter, regardless of when the amendment is adopted <u>[in this State]</u>.</p>	
	<p>BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. UCIOA §1-201 is the source of this section. 2. The official comments to §1-201 of UCIOA (1994) should be used for guidance in interpreting this section. 	
	<p>§ ____: 1-12. Exception for Small Condominiums. [Source: UCIOA §1-203.] If a condominium contains no more than [42] <u>five units</u> and is not subject to any development rights, it is subject only to sections ____: 1-4 (Separate Titles and Taxation) and ____: 1-5 (Conformance with State and County Land Use Laws) unless the declaration provides that the entire chapter is applicable. <u>[Some regulators object to this exception for small condominiums, since the Real Estate Branch receives many complaints about such projects. The regulators might agree to exceptions for small condominiums that have already been built since such units can be inspected by potential purchasers.]</u></p>	
	<p>BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. UCIOA §1-203 is the source of this section. 2. The official comments to §1-203 of UCIOA (1994) should be used for guidance in interpreting this section. 3. Even if the disclosure provisions of this chapter do not apply to a small condominium, disclosure statements are still required under other laws such as HRS Chapter 508D (Mandatory Seller Disclosures in Real Estate Transactions). Conforming language should be adopted for such provisions (e.g., changing “unexpired public report” in HRS §508D-3(8) to “current public report”). <p>Condominium Recodification Attorney's Comment</p> <p>UCIOA and UCA exempt small (no more than 12 units) cooperatives and planned communities (but not condominiums) from their provisions.</p> <p>HRS Chapter 514A applies to all new condominiums. [See, HRS §514A-1.5 (Applicability of chapter).] However, the fidelity bond requirements of HRS §514A-95.1 (Association of apartment owners registration; fidelity bond) apply only to those condominiums having six or more units.</p> <p><u>For discussion:</u> In keeping with our desire to lessen the regulatory burden on Hawaii's people, it would seem to be appropriate to exempt smaller condominium projects from most of the requirements of the recodified condominium law (unless they choose to “opt-in” to its provisions). Consistent with HRS §514A-95.1, I have chosen “five” as the maximum number of units in a “small condominium” eligible for exception.</p>	
	<p>§ ____: 1-13. Applicability to Pre-Existing Condominiums. [Source: UCIOA §1-204.] Except as provided in section ____: 1-14 (Exception for Small Pre-Existing Condominiums), sections ____: 1-4 (Separate Titles and Taxation), ____: 1-5 (Conformance with State and County Land Use Laws), ____: 2-____ (Merger of Increments), ____: <u>5-4(a)(1)</u> through (6) and (11) through (16) (Powers of Unit Owners' Association), ____: <u>5-29</u> (Tort and Contract Liability), ____: <u>5-34</u> (Lien for Assessments), and ____: <u>5-40</u> (Association Records), and section ____: 1-3 (Definitions) to the extent necessary in construing any of those sections, apply to all condominiums created in this State before the effective date of this chapter; but those sections apply only with respect to events and circumstances occurring after the effective date of this chapter and do not invalidate existing provisions of the declaration, bylaws, condominium map or other constituent documents of those condominiums.</p> <p><u>For [the] purposes of this chapter, the terms “condominium property regime” and “horizontal property regime” shall be deemed to correspond to the term “condominium”; the term “apartment” shall be deemed to</u></p>	

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	<p>correspond to the term “unit”; the term “apartment owner” shall be deemed to correspond to the term “unit owner”; and the term “association of apartment owners” shall be deemed to correspond to the term “unit owners’ association”.</p>	
	<p style="text-align: center;">BRRAC’s [Real Estate Commission’s] Comment</p> <ol style="list-style-type: none"> UCIOA §1-204 is the source of this section. The official comments to §1-204 of UCIOA (1994) should be used for guidance in interpreting this section. <p style="text-align: center;">Condominium Recodification Attorney’s Comment</p> <p>The second paragraph of §1-204 is added to aid interpretation of documents for pre-existing condominiums. It is similar to §55-79.40 (Application and construction of chapter) of the Virginia Condominium Act.</p> <p>For discussion: There may be more corresponding terms that should be defined for the transition from HRS Chapter 514A and its predecessor statutes to the recodification.</p>	
	<p>§ ____: 1-14. Exception for Small Pre-Existing Condominiums. [Source: UCIOA §1-205.] If a condominium created within this State before the effective date of this chapter contains no more than [42] five units and is not subject to any development rights, it is subject only to sections 1-4 (Separate Titles and Taxation) and 1-5 (Conformance with State and County Land Use Laws) unless the declaration is amended in conformity with applicable law and with the procedures and requirements of the declaration to take advantage of the provisions of section ____: 1-15, in which case all the sections enumerated in section ____: 1-13 apply to that condominium.</p>	
	<p style="text-align: center;">BRRAC’s [Real Estate Commission’s] Comment</p> <ol style="list-style-type: none"> UCIOA §1-205 is the source of this section. The official comments to §1-205 of UCIOA (1994) should be used for guidance in interpreting this section. 	
	<p>§ ____: 1-15. Amendments to Governing Instruments. [Source: UCIOA §1-206.] (a) The declaration, bylaws, condominium map or other constituent documents of any condominium created before the effective date of this chapter may be amended to achieve any result permitted by this chapter, regardless of what applicable law provided before this chapter was adopted.</p> <p>(b) An amendment to the declaration, bylaws, condominium map or other constituent documents authorized by this section must be adopted in conformity with any procedures and requirements for amending the instruments specified by those instruments or, if there are none, in conformity with the amendment procedures of this chapter. If an amendment grants to any person any rights, powers, or privileges permitted by this chapter, all correlative obligations, liabilities, and restrictions in this chapter also apply to that person.</p>	
	<p style="text-align: center;">BRRAC’s [Real Estate Commission’s] Comment</p> <ol style="list-style-type: none"> UCIOA §1-206 is the source of this section. The official comments to §1-206 of UCIOA (1994) should be used for guidance in interpreting this section. 	
	<p style="text-align: center;">Condominium Recodification Attorney’s Comment</p> <ol style="list-style-type: none"> HRS §514A-2 (Chapter not exclusive), which reads as follows, has been deleted: “<i>This chapter is in addition and supplemental to all other provisions of the Revised Statutes; provided that this chapter shall not change the substantive law relating to land court property, and provided further that if this chapter conflicts with chapters 501 and 502, chapters 501 and 502 shall prevail.</i>” <p><i>See discussion under §____: 1-6 regarding the potentially disastrous effects of the 2001 Nonprofit Corporations Act (Act 105, SLH 2001) if it were to be applied to nonprofit corporation condominium associations (or any other common interest ownership community associations). HRS §514A-2 would have made Hawaii’s condominium law</i></p>	

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	<p>“supplemental” to the new nonprofit corporations law.</p> <p>2. HRS §514A-7 (Condominium specialist; appointment; duties) has been moved from Part I (General Provisions) to Part III (Administration and Registration of Condominiums), §___: 3-11.</p>	